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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA,

4 v.

13 CR 55 (GBD)

5 ROGELIO LEYBA,

6 Defendant.

7 -----x

8 New York, N.Y.
9 September 3, 2014
10:30 a.m.

10 Before:

11 HON. GEORGE B. DANIELS,

12 District Judge

13 APPEARANCES

14 PREET BHARARA

15 United States Attorney for the
Southern District of New York

16 EDWARD B. DISKANT

Assistant United States Attorney

17 WILENS & BAKER, P.C.

18 Attorneys for Defendant

19 DANIEL S. KRATKA

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(In open court; case called)

THE LAW CLERK: Will the parties please rise and make their appearances starting with the government.

MR. DISKANT: Good morning, your Honor. Edward Diskant for the government.

THE COURT: Good morning, Mr. Diskant.

MR. KRATKA: Good morning. My name is Daniel Kratka, and I represent Mr. Leyba.

THE COURT: Good morning, Mr. Kratka and Mr. Leyba.

Mr. Kratka, have you received a copy of the presentence report and had an opportunity to review it with your client?

MR. KRATKA: Yes, I have, your Honor.

THE COURT: Do you have any objections or corrections to be made to the report itself?

MR. KRATKA: No, your Honor.

THE COURT: Let me first turn to the government.

Mr. Diskant, do you wish to be heard first on sentencing?

MR. DISKANT: Your Honor, the government worked very extensively with Probation on a very detailed PSR, which I know the Court has had an opportunity to review. Therefore, I didn't feel the need to put in an additional submission. As detailed in the presentence report, the defendant was involved in a much larger scheme to defraud Medicaid and potentially

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1 hurt HIV/AIDS patient business redistributing secondhand HIV
2 medications. He did so from a base of operations in New
3 Jersey. And consistent with the recommendation of Probation
4 and in light of the defendant's conduct, the government
5 believes a sentence within the advisory guidelines range is
6 appropriate.

7 As discussed in some detail in the defense submission,
8 it is true the defendant made some attempts to provide
9 assistance to the government. As the Court can tell from the
10 docket in this case, sentencing was adjourned on a number of
11 occasions to allow those efforts to go forward. They
12 ultimately didn't come to fruition, which is why there is no
13 5K1 letter in this case. It is certainly true and the
14 government does not dispute that the defendant on a series of
15 occasions made attempts to provide assistance to government
16 investigators.

17 THE COURT: I don't believe I had any codefendants in
18 the related cases. Were there other codefendants in related
19 cases that were prosecuted and what was the result?

20 MR. DISKANT: There were approximately 60 cases and 48
21 of them are pending before Judge Cote. That case is United
22 States v. Viera. The defendants in that case have been
23 sentenced from anywhere to probation to well over 100 months in
24 prison depending on the scope of their involvement. There are
25 also a series of other defendants pending before Judge

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1 Hellerstein, Judge Gardephe and Judge Sweet involving other
2 participants in this scheme. In terms of other people on the
3 defendant's level, some of the closest comparisons would be
4 Juan Cocharto, who is pending before Judge Hellerstein who was
5 sentenced to 30 months' imprisonment. There is Arcadeo Reyes
6 Arias, a defendant pending before Judge Gardephe, and he has
7 not yet been sentenced.

8 THE COURT: Is there a reason why this is a separate
9 case from the others?

10 MR. DISKANT: Yes, your Honor. The defendant was
11 arrested at a separate time and based on a separate complaint,
12 and the Judge Cote stopped accepting the consolidated cases
13 after a certain point.

14 THE COURT: Was he alleged to be in a conspiracy with
15 the other defendants or was he separately charged?

16 MR. DISKANT: He was charged separately, your Honor.
17 I apologize. To clarify, when I say they are related cases,
18 there was one large-scale investigation launched with the
19 health care task force of the FBI into this particular scheme.
20 Then I guess the best analogy would be a spoke and wheel
21 conspiracy, which is to say there were a number of different
22 pockets of the conspiracy. This particular defendant was not
23 directly associated with all of or many of the people charged
24 in the big case before Judge Cote. He was involved with
25 several of the them and those are the individuals who are

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1 identified in the complaint as the cooperators who ultimately
2 led us to the defendant, which is how the defendant was
3 ultimately charged. Those cooperators have not yet been
4 sentenced.

5 THE COURT: What is the nature of his coordinated
6 activity with other defendants?

7 MR. DISKANT: Certainly, your Honor. The way the
8 defendant participated in the scheme was that he would purchase
9 secondhand bottles -- what we called secondhand bottles of
10 medication from insurance beneficiaries both here in New York
11 and on the streets of Newark, New Jersey. He would then resell
12 those bottles to higher level aggregators. Those are the
13 primary coconspirators whose involvement we have focused on.
14 We have not charged the insurance beneficiaries who by and
15 large sold their bottles.

16 One of the large-scale aggravators this defendant sold
17 to is an individual what we identify as CW1 in the complaint.
18 He is certainly part of the larger conspiracy that is charged
19 in the big case. CW1 would in turn aggregate bottles that he
20 purchased from individuals like this defendant and resell them
21 directly to corrupt wholesale distributors who in turn would
22 feed them back to the chain of circulation.

23 THE COURT: So in the chain of activity, this
24 defendant would sell to aggregators who would then sell to
25 distributors?

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1 MR. DISKANT: Correct, your Honor.

2 THE COURT: Pharmaceutical distributors?

3 MR. DISKANT: Exactly.

4 THE COURT: Basically the pharmaceutical distributors
5 were getting prescription drugs from the street at a cheaper
6 price and filling their other individual's legitimate
7 prescriptions with those drugs?

8 MR. DISKANT: That's exactly right, your Honor. At
9 the very end stage of the scheme, pharmacies were
10 redistributing these bottles to unsuspecting patients and
11 Medicaid was paying the full price, which was upwards of \$1,800
12 a bottle. The the pharmacies and/or distributors were making
13 massive profits by purchasing these off the streets in essence
14 for pennies on the dollar before redistributing and seeking
15 full reimbursement.

16 THE COURT: It doesn't involve either expired or
17 adulterated or fake drugs?

18 MR. DISKANT: It does involve adulterated drugs. Part
19 of the scheme, and the defendant allocuted to this and it is
20 discussed in the presentence report, in order to make these
21 bottles appear to be new, the scheme participants would use
22 lighter fluid and other dangerous chemicals to peel the patient
23 label off of the bottles. The defendant had some participation
24 in this. Certainly the people the defendant sold to had quite
25 a bit of participation in this. As part of the investigation

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1 in this case, we subjected or had the retailers subject bottles
2 that we recovered as part of the scheme's testing, which
3 determined in fact that chemicals -- things like lighter
4 fluid -- did seep into the bottles as part of that treatment.

5 More generally they were adulterated in the sense that
6 people like the defendant were storing these bottles in
7 unsanitary conditions. We executed a search warrant on the
8 defendant's residence at the time he was arrested and we
9 recovered a number of these bottles in boxes and otherwise
10 being stored just in his apartment, which may not sound sort of
11 in the ordinary course of all that big of a deal, but many of
12 these drugs have very specific requirements for the temperature
13 they need to be kept at and the conditions in which they need
14 to be stored, and none of those requirements were being met by
15 the scheming participants.

16 THE COURT: What is the period of time and the
17 estimate of his proffer in this case?

18 MR. DISKANT: The defendant is being charged for his
19 participations during a relatively finite period as a condition
20 of the plea agreement. So consistent with the plea agreement,
21 I am going focus the Court on two particular sales that the
22 defendant engaged in, sales of pills, of bottles to one of our
23 cooperators. Both of those sales occurred in the late summer
24 and full of 2012 before his arrest in August of 2012. We then
25 executed a search warrant at the time of the defendant's arrest

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1 and recovered a number of additional bottles at that time, and
2 it is the Medicaid reimbursement value of those bottles, that
3 is the bottles that the defendant sold highlighted in the PSR
4 as well as the bottles recovered from his apartment, that we're
5 holding him individually responsible for.

6 The defendant's actual in-pocket profits are a little
7 bit more difficult to measure. In no small part because of the
8 nature of the scheme involved the defendant buying these
9 bottles on the cheap and then reselling them cheaply. So
10 certainly the defendant made substantially less himself than
11 the loss caused to Medicaid. I will direct the Court to the
12 fact that only two occasions our cooperator purchased bottles
13 from the defendant, on each of those occasions he paid
14 approximately \$5,000 for the bottles that he was purchasing.

15 THE COURT: What is the period of time that you have
16 evidence that he was engaged in this activity?

17 MR. DISKANT: Again, I want to be consistent with the
18 terms of the plea agreement. I think it is certainly true, and
19 I don't think the defendant would dispute, that had he gone to
20 trial the government would have sought to prove the defendant's
21 involvement in the conspiracy for quite a number of years.
22 Again, for purposes of the plea agreement, we're holding the
23 defendant responsible for the sales that occurred over
24 approximately a six-month period in 2012.

25 THE COURT: You say that the volume of sales over that

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1 period of time that I should hold him responsible for?

2 MR. DISKANT: Certainly the two sales that were
3 conducted with our cooperating witness, each of which involved
4 a number of bottles. The PSR details both of them. For
5 example, paragraph 26 details the November 30th sale, which
6 involved approximately 60 bottles of secondhand medication
7 which were sold from \$5,000 in cash. The medicaid
8 reimbursement value of those bottles was approximately \$61,000.
9 Turning back a page to paragraph 24 it details an August 14,
10 2014 sale, which also involved approximately 60 bottles of
11 secondhand medication, which were sold for approximately the
12 same price and had a Medicaid reimbursement value of
13 approximately \$36,000. So those are two sales that certainly
14 we know all of the particulars of.

15 There was as search warrant executed at the
16 defendant's arrest at the time that he was arrested and there
17 are approximately 100 additional bottles recovered at that time
18 with a Medicaid reimbursement value of \$100,000. We submitted
19 a proposed restitution order to the Court, which is the basis
20 for the loss calculation in the plea agreement with the
21 combined value of the bottles that I just spoke as coupled with
22 the value of the bottles recovered from the defendant's
23 apartment when the search warrant was executed.

24 THE COURT: Thank you.

25 Mr. Kratka, do you want to be heard?

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1 MR. KRATKA: Yes, Judge. Did the Court receive my
2 presentence memo?

3 THE COURT: Yes.

4 MR. KRATKA: I just wanted to highlight a couple
5 things. The government and I do not disagree with regard to
6 the facts of this case. First, your Honor, I would say for the
7 record that my client is joined this morning by his aunt and
8 niece. He lives with them. As well as one of his five
9 daughters who is 14, Valerie. His other children are much
10 younger and was inappropriate to bring them to court this
11 morning. They are here in support, your Honor.

12 Your Honor, as I said the government and I don't
13 dispute this case before your Honor is part of a much, much
14 greater case of approximately 60 defendants who were engaged in
15 this conspiracy fraud and there were various levels of which
16 the participant took place. At the lower level, your Honor,
17 there were these collectors, people such as my client, your
18 Honor, who lived in neighborhoods who worked at bodegas and who
19 had access to low-income individuals who were looking to and
20 needed to sell medication in order to support themselves and he
21 acted as the conduit in which to obtain those medications.
22 Those medications then went up the ladder and were sold to
23 aggregators. Those were people who bought from many different
24 collectors. And even within the aggregators there were
25 low-level aggregators and high-level aggregators based on

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1 volume and how many collectors they were purchasing it from.

2 Then you went from there, your Honor, to these corrupt
3 distribution companies who ultimately bought these drugs and
4 then sold them to the unsuspecting pharmacies for a greater
5 profit. Obviously, your Honor, as you go up the chain, the
6 profit to these defendants increased expedientially there.

7 I should say, your Honor, what I made clear in my
8 presentence report, is that these other cases of approximately
9 60 defendants, and one of the cases had 48 defendants, which is
10 in front of Judge Cote, if you read through that indictment,
11 many or most of the individuals charged in that indictment were
12 part of organized crime. They are referred to as the criminal
13 organizations of X and of Y. They were operating in a very
14 formulaic way. That indictment in front of Judge Cote was
15 brought by the organized crime division of the United States
16 Attorney's Office. Mr. Diskant is not part of that organized
17 crime unit and this case was not brought under that rubric; but
18 simply, your Honor, I point that out for the fact that those
19 cases not only involved many of these higher-level participants
20 in the conspiracy who profited greatly, but they also involved
21 individuals that were involved in other crimes, not only
22 Medicaid fraud but money laundering and wire fraud and then
23 narcotics conspiracy for buying and selling Oxycodone and
24 Oxymorphone. None of those things my client has ever been
25 involved in. History-wise as your Honor knows this is his

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1 first contact with the criminal justice system, but he was
2 involved in the Medicaid fraud to the degree that is outlined
3 in the presentence report and to the degree that was stated by
4 Mr. Diskant.

5 The only issue I take, and it is just a slight issue,
6 is with regard to these drugs that my client did collect. I
7 don't believe that my client was involved in adulterating the
8 medications whereby taking lighter fluid to peel off the labels
9 on medications. I believe from the PSR that all of the
10 medications that were found when the search warrant was
11 executed at his residence indicated that the bottles were in
12 there original condition as they were sold to him, that they
13 were not lighter fluid or chemicals. He was not part of that
14 process, that sophisticated process. That took place by the
15 aggregators that he sold to and other aggregators. It is
16 beyond dispute that, your Honor, that storing medications such
17 as these in your apartment under unsanitary conditions and
18 under conditions which medications is not to be stored is
19 certainly -- these drugs were diluted and they shouldn't have
20 been kept in that condition. I am just saying there is a
21 little bit more of a level of sophistication of taking lighter
22 fluid and peeling off the labels that he wasn't directly
23 involved in. Certainly it is part of the overall conspiracy
24 and his involvement in the conspiracy is not challenged in any
25 regard, your Honor. I wanted your Honor to take that into

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1 account in terms of where this defendant falls in terms of his
2 participation in the case.

3 I will say also, your Honor, as Mr. Diskant said that
4 the two sales that he is being held responsible for here that
5 took place when he sold to a cooperating witness, his profit on
6 that was \$9,000. There were two sales as Mr. Diskant noted.
7 There is a Medicaid value of about \$100,000. We don't dispute
8 the total amount of restitution that is due here. I think it
9 is \$168,000. A little bit over \$168,000. That is correct and
10 my client does -- \$184,000 -- and my client does intend to pay
11 that money.

12 Your Honor, I am asking I think, your Honor, in this
13 case for a very reasonable request here. His guidelines
14 sentencing range is between 18 and 24 months. There is an
15 alternative sentence here that I think makes sense on so many
16 different levels legally and factually and what is just fair
17 and appropriate here. What I asked your Honor to impose is a
18 sentence of five years' probation with home detention and
19 continued community service that he has already been engaged in
20 for the last year and a half in his own community. The reasons
21 are very simple, your Honor. First of all, your Honor, this is
22 my client's only contact with the criminal justice system. He
23 has been here for over 18 years. He has tried, your Honor, to
24 the best of his ability to make amends for his conduct over
25 that year and a half. He has made every single effort that we

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1 could ask of a defendant to do. He has done it openly. He has
2 done it wholeheartedly. He has done it without reservation.

3 He did try, your Honor, to cooperate with the
4 government. He met with agents on numerous occasions on the
5 streets of Newark. This is somebody, your Honor, that has his
6 ear to the ground in Newark as a bodega owner. He knows what
7 is going on in the street. Every single person that comes into
8 his bodega is not just somebody who has frequented his bodega.
9 They are people that he knows and his family knows from the
10 community. They are friends and acquaintances. Your Honor, he
11 put that in some sense on the line, your Honor, by meeting with
12 the agents, letting them know what is going on in the community
13 and trying as best he could, your Honor, to provide information
14 that would be helpful to the agents in bringing further cases
15 with regard to Medicaid fraud but also with regard to other
16 criminal offenses that he knew were going on around him.
17 Again, your Honor, it was through no fault of his own that that
18 did not pan out and there were no arrests based on information
19 he gave. But this was someone, your Honor, that recorded more
20 than 20 telephone calls over a four-month period. This was
21 somebody who in broad daylight would go into the agents' car
22 and meet with them. This could have put him and his family at
23 risk if it were discovered.

24 But, your Honor, there is legal leeway for your Honor
25 to impose based on that non-5K1 cooperation a nonguideline

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1 sentence in this case. That was as I cited *United States v.*
2 *Fernandez* where Judge Cote actually did not impose a reduction
3 because the defendant in that case, while he began to
4 cooperate, he was deceitful with the government and that is why
5 his relationship with the government terminated. Here, your
6 Honor, that is not the situation. In this case, his
7 cooperation was terminated again through no fault of his own.
8 And I think most telling, your Honor, was what Judge Cote said
9 in that case, Cooperation is not simply agreeing to help the
10 government for the sake of helping the government. It also
11 shows the willingness on the part of a defendant who has
12 decided to make a clean and full break and change in a
13 significant way their choices that they make in life. We're
14 not talking about here, your Honor, a defendant who was engaged
15 in other criminal conduct, in multiple fast criminal conduct
16 that had dealings with organized crime. This is a simple
17 person, a family man, whose crime pertained to this Medicaid
18 fraud conspiracy who tried to make amends by his cooperation.
19 And I think, your Honor, that that goes to his character, his
20 history, and a real reflection on his part to want to make
21 amends for his criminal conduct. I think in that case it is
22 put beautifully by Judge Cote that that would be factored into
23 the sentence in deciding whether to give a defendant a
24 nonguideline sentence.

25 Secondly, your Honor, this was not only backed up --

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1 his cooperation and his desire to make amends for his conduct
2 in this case -- was not only backed up by his cooperation, but
3 it was backed up by deeds and by actions. That was, your
4 Honor, he has been out and Pretrial Services has been
5 monitoring him. He has been out for the last year and a half,
6 a significant period of time. As your Honor can read from the
7 presentence report, there has been never been an issue. He has
8 always been prompt. He has abided by all of those conditions
9 over that year and a half, which again, your Honor, I think are
10 indicative of what the future would hold for him in terms of
11 his compliance with a probationary sentence.

12 But, your Honor, on his own volition, not through
13 Pretrial Services, he went out into his community into Newark
14 again as a person of the people living there working in the
15 bodega there and he volunteered over 100 hours, your Honor, to
16 a local not-for-profit community center that the name is Focus
17 that serves the needs and the poor and the elderly of Newark by
18 providing meals, education and employment training. I provided
19 a letter in my submission to your Honor from the director of
20 the program who basically said, your Honor, what I am saying
21 here about him. He is dependable. He is reliable. If he says
22 he is going to do something, he does it. His participation in that
23 program, your Honor, I think again, your Honor, really speaks
24 to a desire to make amends for the conduct.

25 The conduct here, your Honor, is that his conduct he

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1 deceived not only the insurance companies but the people that
2 he was living with, the people living in his community were
3 deceived. These were people who should have been taking their
4 medication. These were poor people. These were elderly
5 people. The crime is somewhat of a crime of betrayal to his
6 own people, the community service he involved himself in. I
7 think that speaks volume of that desire do amend that, to make
8 that right going forward. Your Honor, the program has agreed
9 that they would have him continue his participation in that
10 program. This is someone that works seven days a week but
11 still finds time to do that community service. And how
12 valuable is that community service to his community and to the
13 government versus putting him in a jail cell to spend his time
14 there in a jail cell. I think that is one of the reasons of a
15 condition of probation I am asking for.

16 Again, your Honor, this is somebody who has had no
17 criminal contact. This is someone who supports his children.
18 This is someone who works seven days a week. It is pretty
19 simple. That is who he is. He works. He provides for his
20 family. He wants, as any father, for his children to do better
21 than he has done. The Supreme Court has noted in *Pepper v.*
22 *United States* that the Court may take into account
23 rehabilitative efforts that defendant has undertaken during the
24 term of a case as evidence of the character of the defendant
25 and likelihood of rehabilitation, which are all goals that are

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1 mentioned under Section 3553 as goals that sentencing should
2 promote.

3 I think also, your Honor, very, very basically just to
4 put it out there, a sentence should certainly fit the criminal
5 conduct that a defendant engages in. It is hard to think of a
6 crime in the federal system where jail fits a crime that is
7 committed. Your Honor, the sentence should also fit the
8 offender. If this is an offender who has made those
9 rehabilitative efforts over the last year and a half and there
10 is an alternative sentence that can promote those sentencing
11 guidelines of rehabilitation, paying back to the community,
12 other people seeing in the community seeing what he has engaged
13 it, it is my belief that is the sentence that should be
14 imposed.

15 There is always going to be time to send Mr. Leyba to
16 jail if he messes up on probation. The fact of the matter is
17 he comes to court this morning showing a year and a half of
18 compliance, of give back and of cooperation, which shows there
19 will be no slipup and that he will continue to maintain living
20 a crime-free life. More substantially, your Honor, a life of
21 purpose, a live of giving back, a life to his family. There is
22 that alternative punishment that again fits the crime but more
23 basically fits the offender.

24 Lastly, your Honor, Mr. Leyba is a legal permanent
25 residence of the United States. He is green card holder. He

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1 has been here for the last 18 years. He has children here. He
2 has family here. This criminal conviction which he pled guilty
3 to subjects him to mandatory deportation if immigration should
4 come for him. He will not be allowed to renew his green card.
5 If he is deported, your Honor, he will never be able to come
6 back into the United States. I represent 90 percent of
7 noncitizens as part of my criminal practice and those facts and
8 consequences are sure and certain. This district, as well as
9 the Eastern District, has recognized that that is a factor that
10 the Court can take into account in deciding whether to give a
11 non-jail sentence or nonguideline sentence is those severe
12 immigration consequences that follow from a criminal
13 conviction, specifically such as this which is classified as an
14 aggravated felony under immigration law.

15 Again, if we just take ourselves out of this courtroom
16 for a second and think about it logically, this is someone that
17 has lived here for 18 years. He has his whole family here. He
18 has a living here. He has a job here. He has people that care
19 about him here. If we take him and deport him to a country
20 where he has nothing, how severe a punishment is that? I think
21 that is why the courts in this district and other districts
22 have recognized that that is a severe consequence that can
23 mitigate your Honor imposing a guideline sentence. It comes
24 down to, your Honor, when is it enough? When is the punishment
25 enough? How much should a defendant have to suffer? How much

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1 should the defendant have to pay? I think, your Honor, again
2 he has done everything from A to Z during this year and a half
3 so he can stand before your Honor I say, I have rehabilitated.
4 I have done everything asked for me. I will continue to do
5 those things. Just don't take me away from my family and let
6 me continue to do those things that I have always been doing.

7 To that end, your Honor, the restitution that he is
8 going to be required to make of \$184,000 of course it goes
9 without saying that if he is put in prison, which costs the
10 Bureau of Prisons these days \$29,000 a year, I think he pays
11 \$25 a quarter if he is working in prison to start repaying that
12 restitution. Certainly, your Honor, if he gets deported, he is
13 not going to be paying that restitution. Again, what better
14 way to address the criminal conduct in this case then to make
15 him pay that money at 10 percent of his gross earnings. This
16 is someone who works seven days a week. This is someone's
17 family who can kick in. They want to make restitution. They
18 want to give back to the community. They want to give it back
19 to the government. Let him do it. If he slips up, messes up,
20 then we'll send him to jail for whatever time the Court deems
21 is reasonable. Let him pay that restitution by continuing to
22 work in a legal way in order to fulfill his obligations under
23 this case to address his criminal conduct.

24 Your Honor, my client would like to address the Court.
25 I have had the pleasure, your Honor, of meeting his niece whose

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1 name is Heidi Malave. She is 20 years old. She attends
2 Sanford University. She is an exceptional young lady. She
3 grew up with Mr. Leyba. If it is okay she wanted briefly to
4 address the court with regard to Mr. Leyba.

5 THE COURT: I will hear from Mr. Leyba.

6 Before I hear from Mr. Leyba, Mr. Diskant, can you
7 identify aggregators to which this defendant supplied drugs and
8 what became of those?

9 MR. DISKANT: Yes, your Honor. We identified at least
10 two of them. One of them is the individual identified in the
11 complaint as CW1. CW1 knew the defendant because the defendant
12 had been selling to CW1 for a period of time before CW1 was
13 arrested. A second was an individual named Eladimir Ricorigo.
14 Mr. Ricorigo has pled guilty. His case is pending before Judge
15 Sweet. His sentencing is scheduled for October.

16 MR. KRATKA: I didn't know that, your Honor. I am
17 hearing this for the first time, that Eladimir pled guilty.

18 Was any of the information that my client supplied
19 about him used in any regard to obtain that guilty plea?

20 MR. DISKANT: No.

21 MR. KRATKA: Your Honor, I am pointing this is one of
22 several individuals that my client knew of.

23 THE COURT: Mr. Leyba, anything you want to say before
24 I impose sentence?

25 THE DEFENDANT: Yes. Your Honor, I ask wholeheartedly

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1 I would like to state from my heart that I am very sorry for
2 the mistake that I committed against the United States. I have
3 tried to make amends and do my best that I can do during the
4 year and a half that I have done and gone through this process.
5 I five children in this country. I thank this country for all
6 the opportunities it has given me. My children are American
7 citizens and they deserve respect from me towards them. For
8 that reason I ask for forgiveness for having committed the
9 mistakes that I committed. After I participate in helping the
10 community and I have done my best in order to start anew to
11 become a better person every day. And what I say to you I am
12 saying it from my heart. These are the words that I have to
13 say to you.

14 THE COURT: I reviewed the presentence report and I
15 accept the factual recitation in the presentence report. The
16 guideline range as calculated is a total offense level of 15
17 and criminal history category I. I have also reviewed the
18 submission by the defendant and considered the arguments made
19 by both sides here today and the statements made by the
20 defendant.

21 In this case I think that it is a reasonable sentence
22 based on the factors that I have considered relevant to
23 sentence in 18, U.S.C., 3553(a) to sentence the defendant to a
24 period of probation as recommended by the defense. I have
25 taken into consideration the defendant's attempt to cooperate

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1 even though it was not to the level warranting a 5K letter from
2 the government. In light of lack of prior criminal history,
3 his age at 41 years old, that I will say it is aberrant
4 behavior over an isolated period of time of an offense which
5 the defendant was involved. I will also consider that he is
6 facing immigration consequences, but I think also that a period
7 of home confinement and further community service given the
8 nature of this offense is appropriate. So I am going to impose
9 a period of three years' probation with a condition of six
10 months' home confinement with an exception to be made by
11 Probation for a reasonable period of time to be outside of the
12 home related to employment. I will also impose 200 hours of
13 community service to be done during the period of probation. I
14 will order restitution and sign the order of restitution
15 proposed by the government in the amount of \$184,123. I will
16 also have to impose the mandatory \$100 special assessment.

17 The mandatory conditions of probation are imposed.
18 The defendant shall not commit another federal, state, or local
19 crime; defendant shall not illegally possess a controlled;
20 defendant shall not possess a firearm or destructive device.
21 The mandatory drug testing conditions is suspended based on the
22 recommendation and this Court's determination that the
23 defendant poses a low risk of future substance abuse.
24 Defendant shall also cooperation in the collection of DNA as
25 directed by the Probation Office.

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1 The standard conditions of supervision 1 through 13 is
2 recommended by the presentence report. I also impose the
3 special conditions: Defendant shall provide the Probation
4 officer with access to any requested financial information;
5 defendant shall not incur any new credit card charges or
6 additional lines of credit without the approval of the
7 Probation officer unless the defendant is in compliance with
8 the installment payment schedule. The defendant shall also
9 obey the immigration laws and comply with the directives of
10 immigration authorities. Defendant shall submit his person,
11 residence, place of business, vehicle or any other premises
12 under his control to a search on the basis the Probation
13 officer has reasonable belief that contraband or evidence of a
14 violation of the conditions of release may be found. The
15 search must be conducted at a reasonable time and in a
16 reasonable manner. Failure to submit to a search may be
17 grounds for revocation. Defendant shall inform any other
18 residents of the premises that the premise may be subject to
19 search pursuant to this condition. The defendant is to report
20 to the nearest Probation Office within 72 hours of entry of
21 today's judgment.

22 Restitution shall be made payable to the Clerk of
23 United States District Court with disbursement to the New York
24 State Department of Health in the amount stated. Restitution
25 shall be paid in monthly installments of 10 percent of gross

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1 income over the period of probation supervision to commence 30
2 days after the date of entry of judgment in this case or on any
3 other schedule based upon Probation's determination of
4 availability of income to pay a greater or lesser amount of
5 restitution.

6 Defendant shall notify the United States Attorney for
7 this district within 30 day of any change of mailing or
8 residence address that occurs during the course of restitution
9 that remains unpaid. The defendant shall be supervised in the
10 district and by the district of his residence.

11 Mr. Leyba, you have the right to appeal this
12 conviction and sentence to the extent you have not waived this
13 right at the time of your plea. If you wish to appeal this
14 conviction and sentence, you must discuss it immediately with
15 your attorney in order to preserve your right to appeal. A
16 notice of appeal must be filed on your behalf within 14 days of
17 entry of today's judgment.

18 Mr. Diskant, anything further?

19 MR. DISKANT: Two very brief matters. I believe
20 technically, your Honor, because Probation is not available for
21 this sentence, the sentence should read time-served to be
22 followed by three years of supervised release as opposed to a
23 sentence of probation. It achieves the same effect. Given his
24 guideline provision is not within Zones A and B, therefore
25 probation is not --

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1 THE COURT: Probation is not provided under the
2 guidelines, but the guidelines are not mandatory and it is not
3 statutorily prohibited.

4 MR. DISKANT: I believe it is, your Honor. I believe
5 it achieves the same end. The judgment needs to be read
6 time-served to be followed by.

7 THE COURT: What provision do you believe that makes
8 probation statutorily ineligible?

9 MR. DISKANT: Your Honor, I don't have it in front of
10 me. The presentence report is consistent with that. It lists
11 the defendant as ineligible for probation on page 19. I can
12 put in a letter if the Court would like one.

13 THE COURT: Let me look at page 19.

14 MR. KRATKA: Paragraph 78 on page 15.

15 THE COURT: Paragraph 78. That's not what paragraph
16 80 says.

17 MR. DISKANT: Your Honor, that's correct. I believe
18 paragraph 80 is speaking of -- that's fine, your Honor.

19 THE COURT: I will go back and look at the statutory
20 provisions. I understand your position. I have confronted it
21 before. My position is that the guideline ineligibility of
22 probation is the same as the guideline -- whether the mandatory
23 nature of the guidelines themselves. And it is superseded and
24 controlled by the statutory availability or prohibition of
25 probation. I don't have a problem if both sides agree that

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1 time-served in a period of supervised release is appropriate
2 instead of probation. I still would be curious and you can
3 still submit to me at some point for future reference why you
4 say that simply if it is a guideline eligibility why
5 statutorily this Court is prohibited from giving probation when
6 Congress provides for a statutory period. That is my
7 understanding of the eligibility for probation or ineligibility
8 for probation.

9 Do you have a position, Mr. Kratka?

10 MR. KRATKA: I don't, your Honor.

11 Can I confer with Mr. Diskant for a moment?

12 THE COURT: Yes.

13 (Pause)

14 MR. KRATKA: Judge, after conferring with Mr. Diskant,
15 I don't have a preference one way or another. I have no
16 objection to either way the Court wishes to proceed.

17 THE COURT: My preference is that his criminal record
18 then reflect that he received a probationary sentence rather
19 than a time-served sentence.

20 MR. DISKANT: Your Honor, that's fine. I will do a
21 little research. If I am incorrect, I can put in a letter.

22 THE COURT: Let me impose the sentence as indicated.
23 If you believe that resentencing is appropriate or if you can
24 submit to me for future reference that will be useful to me.
25 My clear recollection of the research and my consistent

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1 position has been that the guidelines -- there is nothing about
2 the guideline provisions at this point that are mandatory and
3 controlling and prevents this Court from exercising the
4 statutorily authorized sentence to be imposed in cases. If
5 there is a provision that says that a nonincarceratory sentence
6 is imposed or incarceration sentence or are any other provision
7 of sentence that the guidelines prohibit a judge from imposing
8 a statutory authorized sentence and really that is not my view
9 of the law.

10 So any open counts?

11 MR. DISKANT: The other matter is that the government
12 would move to dismiss the open count at this time.

13 THE COURT: That application is granted.

14 Anything further, Mr. Kratka?

15 MR. KRATKA: No, your Honor.

16 THE COURT: That's is the sentence.

17 MR. DISKANT: Thank you, your Honor.

18 o0o